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NO. 82-658

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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CONSOLIDATED SERVICE CORPORATION,
WATTS DETECTIVE AGENCY
AND
CHRISTOPHER P. RECKLITIS,

PETITIONERS

V.

ROBERT ROBINSON, TRUSTEE IN BANKRUPTCY
OF D. C. SULLIVAN & CO., INC.,

RESPONDENT

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# RESPONDENT'S BRIEF IN OPPOSITION

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## TABLE OF CONTENTS

SUPPLEMENTAL STATEMENT OF FACTS..... 2

REASONS WHY THE WRIT SHOULD BE DENIED

1. Recklitis' Criminal Conviction Was Admissible..... 9

2. No Conflict In Circuits Exists Regarding The Fact That This Corporate Takeover Constituted A "Fraudulent Transfer" Under The Bankruptcy Act..... 13

3. The Petitioners Took Property Belonging To The Bankrupt Which Had Value..... 17

CONCLUSION..... 22

## TABLE OF AUTHORITIES

### CASES

Kaiser-Aetna v. United States, 444 U.S. 164, 179-180 (1979)..... 17, 18, 19

Pirie v. Chicago Title & Trust Co., 182 U.S. 438 (1901)..... 19

Trask v. Susskind, 376 F.2d 17 (5th Cir. 1967)..... 14, 15, 16

United States v. Dixon, 547 F.2d 1079, 1082 (9th Cir. 1976)..... 12

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The respondent, Robert Robinson, Trustee in Bankruptcy of D. C. Sullivan & Co., Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 685 F.2d 729.

## SUPPLEMENTAL STATEMENT OF FACTS

From skeletal facts petitioners are wont to devise an image of themselves as a beneficient employment agency, in order to try and construct some issue warranting review. Some additional facts are mandated, so that the Court may see the petitioners as the corporate rapists they were, and properly assess that there was such a patent "fraudulent transfer" under the Bankruptcy Act that this case does not warrant intruding on the Court's burdened calendar.

The opinions of the courts below, set out in the Appendix to the petition, give an accurate, detailed picture of what occurred, but some "flavor" of petitioners' takeover of D. C. Sullivan & Co., Inc., will be here assayed summarily.

D. C. Sullivan & Co., Inc. was a rather

specialized security guard business--a strictly service enterprise, having little real property--a matrix of about 225 very loyal guards, supervisors, and office personnel, providing specialized security services particularly orchestrated for the needs of some 17 very loyal, highly reputable, and financially secure customers (A-3-A-4; A-8). Many of the customers were engaged in government defense work, like Itek and Honeywell, and most of the Sullivan guards had the security clearances necessary thereto (A-8; A-35-36). Specialized manuals were developed detailing the customers' particular needs, and continuity of security services provided was the sine qua non of the business (A-7-8; A-39-41). Billy R. Otte ("Otte") an ex-FBI agent with impecable credentials, was the day-to-day operating manager of the business, and the vital link to the

maintenance of both the customer and employee relations necessary to insure continuity (A-3-4; A-7-8; A-28; A-45-46).

In January, 1970, the petitioner, Recklitis, bought the petitioner, Watts Detective Agency, and made it a subsidiary of the petitioner, Consolidated Service Corporation, which parent corporation was wholly owned by Recklitis (A-4). Watts was also a Boston based security guard business, about the same size as the Sullivan Company, and the next month, February, 1970, Recklitis entered into negotiations to end up servicing the customers of the financially ailing Sullivan Company with its all-important specialized employees, and during those negotiations petitioners had full access to the Sullivan books (A-4-5; A-27-28; A-35). Recklitis was not merging Sullivan into Watts, was assuming none of the

Sullivan liabilities (which debt structure, excessive salaries and rents were causing net losses), nor even getting its accounts receivable--he was looking to buy the pure business opportunity of adding the Sullivan customers and special servicing employees to Watts' guard business (A-4-5; A-27-28; A-35). An important part of Recklitis' initial $200,000 plus purchase offer was to hire Otte to work for Watts, and Otte had contacted the Sullivan customers about the impending sale and had been assured that they would continue to be customers of the new owner, since Otte and the other Sullivan employees would continue to supply their specialized security needs without interruption (A-4; A-27).

The largest Sullivan creditor was IRS, and they finally determined to levy on the

Sullivan accounts receivable for taxes owed unless some satisfactory arrangements could be made, including a substantial immediate cash payment (A-4-5; A-27-28). Toward that end, a conference was had on April 23, 1970, between IRS, Sullivan and Otte, and Recklitis, the upshot of which was that the levies would not be made if Recklitis would pay IRS the $50,000 cash which was part of his then outstanding purchase offer, but Recklitis refused. Daniel C. Sullivan, the founder and president of Sullivan, just walked away numb, with the IRS levies to be made the next morning, and Recklitis, armed with the knowledge that, at least in Sullivan's and Otte's minds, they were out of business, proceeded to hire Otte on the spot and directed him to make the necessary phone calls and arrangements to insure the uninterrupted transfer of the Sullivan

customers and employees to Watts, and agreed to pay the $39,000 of "bounced" Sullivan salary checks of any employees who came to work for Watts, all to insure the vital continuity of service (A-5; A-12-14; A-27-28; A-55). Recklitis was well aware that he was then in a position to take for nothing the valuable business opportunity for which he had until then been willing to pay substantial money--that he "didn't just happen to be" "standing under the tree when the apples fell"--because he said to Otte: "it's a dirty way to do it, but these accounts are up for grabs", and he had "no qualms" about taking them (A-5). People called him a lot of things, Recklitis said, but "never have I been accused of being stupid" (Tr. 579).

Otte did the job for Recklitis; Watts managing to retain about three-quarters of

the Sullivan customers and provide them uninterrupted service, and in the next year Watts grossed about $680,000 from those Sullivan accounts (A-5; A-20; A-23). Starting the morning after the IRS conference and Recklitis' take over, the ex-Sullivan employees continued business as usual, operating out of the Sullivan offices and using the all-important Sullivan business records, customer manuals and information, for at least days and maybe weeks (A-28; A-37-41). The petitioners never paid the Sullivan Company or the trustee a dime for the valuable business they took, lock, stock and barrell (A-2).

In 1972, Recklitis sold all his Consolidated corporations to SCA, a very large national company, whose stock was and is traded on the New York Stock Exchange. He eventually became president of SCA, and a few months before the trial he pleaded guilty to three counts of a 12-count federal

criminal indictment, and was sentenced to two years, 18 months suspended, and a fine of $21,000, for "devising a scheme and artifice to defraud SCA" and for filing "false and misleading statements" with the SEC (A-18-19; A-56).

## REASONS WHY THE WRIT SHOULD BE DENIED

### 1. Recklitis' Criminal Conviction Was Admissible.

Two of the three Questions Presented in the petition relate to the admission into evidence of Recklitis' criminal fraud conviction in the course of his testimony elicited by the trustee. The lower court had little difficulty holding that "there was no error in admitting this evidence" (A-18-19). The court found the basis for that ruling in the provisions of Federal Rules of Evidence 607 and 609 and Federal Rules of Civil Procedure 43 (b) (A-18-19). The latter reference was, of course, an oversight, as Rule 43(b) was

abrogated in 1975, and that erroneous reliance is the sole basis of petitioners' second question presented here. Had Recklitis brought the oversight to the lower court's attention in his petition for rehearing, which he did not, the court would no doubt have corrected the reference to the valid Rules citations fully justifying the admissibility of the conviction.

Petitioners make but one argument: that since Recklitis' conviction was put into evidence upon his being called as a witness by the trustee, there was a violation of Rule 609 of the Federal Rules of Evidence, providing that such a conviction may be "admitted if elicited...during cross-examination." The argument is, essentially, nothing but a semantic construct. By saying that the trustee was examining Recklitis "on direct

examination", because the trustee called him as a witness, petitioners say the conviction was not "elicitied...during cross-examination", but the simple answer is that Recklitis, as an opposing party, was on "cross-examination" by the trustee from the very first question. The court below accepted that assertion: "that because Recklitis was an opposing party, when he was called to testify he was being cross-examined in the first instance...." (A-18-19). The abrogated Rule 43(b) specifically provided that "an adverse party" could be called and the proponent "impeach him in all respects", and the Reporter's Notes to Rule 43(b) now assert that that "subdivision is no longer needed or appropriate since the matters with which it deals are treated in the Rules of Evidence." And so they are, as the Reporter's Notes continue: "...Who may

impeach is treated in Evidence Rule 607, and scope of cross-examination is covered in Evidence Rule 611(b)." No change of substance was worked or intended by the Rules of Evidence, and those were the appropriate citations supporting the holding of the court below. Rule 607 specifically authorized the trustee to attack the credibility of Recklitis, and Rule 611(b) authorized the admissibility of his criminal conviction. There simply was no error--no question even to present to this Court.

The lower court's affirmance of the admissibility of Recklitis' conviction is specifically concurred with in the only other case dealing with the question, United States v. Dixon, 547 F.2d 1079, 1082, n. 2 (9th Cir. 1976), quoted in the opinion below (A-19):

> "...Moreover, Rule 607, by its terms places no limitations on the manner in which a party may impeach his own witness, and there is no reason to believe that such a witness cannot be impeached by evidence of a prior convictions."

Not only do the petitioners, therefore, not present an error of any kind, they can point only to the concurrence of the only other Circuit to address the issue--not even an arguable conflict, nor any other "consideration" alluded to in Rule 17 of the Court for granting review on this point. Even to proffer it as a "cert-worthy question" is frivolous.

2. No Conflict In Circuits Exists Regarding The Fact That This Corporate Takeover Constituted A "Fraudulent Transfer" Under The Bankruptcy Act.

Petitioners'denominated arguments III and IV (ostensibly facets of their third question presented) color their

takeover of the Sullivan Company as an altruistic effort to reduce the unemployment rolls and continue servicing the customers otherwise bereft by the bankruptcy, maintaining that the lower court's holding that there was to that extent a "fraudulent transfer" conflicts with the Fifth Circuit case of Trask v. Susskind, 376 F.2d 17 (5th Cir. 1967). Both lower courts properly distinguished Trask because the bankrupt had ceased doing business before the employees were hired by petitioners' counterpart, while Sullivan Company was here warrantably found by the jury to still be a going concern (A-9; A-44). Actually, the facts of the Trask case distinguish it even more substantially, and remove any arguable conflict, which petitioners simply undertake to ignore. The Trask former employer had not only ceased doing business before only two of

its ex-employees solicited some former customers for a competitor, it had already declared bankruptcy. It's "value" was, therefore, incapable of being transferred. Also, unlike this case, the bankrupt had been in the wholesale grocery business, selling fungible products, not providing the very special particularized services which Sullivan sold; its two employees hired away were just salesmen, having no special business information of particularized value to any customer, and the grocery customers had no special needs. The two Trask employees were not all the hundreds of specially qualified employees taken from Sullivan. The two Trask employees also had no unique abilities--most particularly no ability to insure the continuity of customer servicing. To the extent that continuity of servicing was a consideration at all to the Trask

customers, they could have simply picked up the phone and had any of the bankrupt's competitors (who had solicited them before, which even Recklitis knew better than even to try to do) deliver the needed cases of lettuce, or whatever, which the bankrupt could no longer supply. Guards with the necessary security clearances, specially trained from manuals detailing the special security needs of the Sullivan customers, vitally dependent upon continuity of that special service, were not waiting in the Yellow Pages. The pivotal catalyst of an Otte was also not in the picture in Trask. The facts of Trask warrant the holding that nothing of value was transferred. The facts of this case demonstrate why this jury and both lower courts were absolutely correct in determining that everything of value Sullivan had was "fraudulently transferred" to petitioners. There is no

conflict between them because their facts are entirely different. Petitioners cloak themselves in whole cloth.

3. The Petitioners Took Property Belonging To The Bankrupt Which Had Value.

Petitioners' final argument V seems to be that there could not be any "fraudulent transfer" of the Sullivan Company employees, customers or "goodwill" because they did not constitute "property" under the Bankruptcy Act, as others could not be excluded from their use. Although they do not specifically argue why this supposed issue warrants review in this Court, the implication is that the lower court's holding to the contrary conflicts with a dictum of this Court in Kaiser-Aetna v. United States, 444 U.S. 164, 179-180 (1979). This argument has even less substance than the previous ones.

Kaiser-Aetna involved a question concerning the "navigable waters" of the United States, and has nothing whatsoever to do with what constitutes the estate of a bankrupt. The Court did note in passing that an element of "property", generally, is "that courts 'may compel others to forebear from interfering' " with it, but the petitioners fail to say that the Court then went on to add: "or to compensate for [its] invasion." Id. at 176. It is that latter legal relief for an "invasion" of property that is in issue in this case, not the alternative equitable remedy which petitioners seize upon.[1] Neither of the

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[1]There is also an instant relevance to another of the Court's observations: "...the fruition of a number of expectancies embodied in the concept of 'property',--exceptancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." Id. at 117 (Emphasis supplied.)

lower courts deemed Kaiser-Aetna worthy even of citation, nor petitioners' "right to exclude" argument of sufficient substance to refute. Their perspicacity merits emulation here.

The Bankruptcy Act defined "property" in, then, 11 U.S.C. §(30), to include anything that results in a transferee ending up with something of value of the bankrupt's, whatever it was and however it was transferred. That is bedrock law. This Court made that very clear long ago in the leading case of Pirie v. Chicago Title & Trust Co., 182 U.S. 438 (1901), at 444:

> "...All technicality and narrowness of meaning is precluded. The word ['transfer'] is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished."

Petitioners grossed $680,000 in the year following the takover just from the Sullivan

accounts they were able to retain. That is eloquent proof that they got something of substantial value. Wily Recklitis--"never...accused of being stupid" (a fraud, yes, but stupid, no)--knew a valuable business opportunity when he saw one, and he knew the only way he could get the Sullivan operation (before the opportunity to take it arose) was to buy it. That is what he negotiated to do, and what he sought to buy he eventually took for nothing. Ten years late--twelve and a half years now--the jury simply said it was time to pay for it.

To cloud the realities, petitioners have constantly tried to atomize the very real business opportuinty they took (no one owns their employees, there were no written contracts with the customers, there was no goodwill, etc.). The lengthy, studious,

and detalied district court opinion (A-26-59) accepted petitioners' efforts to fragment the whole, and disposed of each element, demonstrating that the evidence warranted the jury's verdict that there was a "fraudulent transfer." The court below better grasped the realities (A-8):

> "The [district] court engaged in a lengthy in-depth analysis of the transfers of the guards, customers and goodwill and held that they were each susceptible of having value and, therefore, of being 'property' in a bankruptcy setting. We agree. We add, however, that what was transferred to Watts amounted in the aggregate to a transfer of the business itself. The whole was greater than its parts."

It should be clear to the Court that the subject petition is totally unmeritorious.

## C O N C L U S I O N

For these reasons, the petition for a writ of certiorari should be denied, and "appropriate damages" assessed.

Respectfully submitted,

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